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NO. _____

THE SUPREME COURT OF THE UNITED STATES

October, 1983 Term

MID-AMERICA MACHINERY COMPANY

v.

NATIONAL LABOR RELATIONS BOARD

PETITION REQUESTING THE ISSUANCE OF A WRIT OF CERTIORARI TO REVIEW A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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MID-AMERICA MACHINERY COMPANY

v.

NATIONAL LABOR RELATIONS BOARD

PETITION REQUESTING THE ISSUANCE OF A WRIT OF CERTIORARI TO REVIEW A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## I. QUESTION PRESENTED FOR REVIEW

DOES THE NATIONAL LABOR RELATIONS BOARD IMPROPERLY EXERCISE ITS REMEDIAL POWERS WHEN IT COMPELS AN EMPLOYER THAT HAS UNLAWFULLY DISCHARGED AN

EMPLOYEE FROM EMPLOYMENT TO PAY THAT EMPLOYEE FOR WAGES LOST DURING A TIME PERIOD SUBSEQUENT TO WHEN THAT EMPLOYEE WAS DISCHARGED FOR CAUSE FROM HIS INTERIM EMPLOYMENT?

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## III. REFERENCE TO THE OFFICIAL REPORTER

The text of the decision of the Administrative Law Judge and the affirmation of that decision by the BOARD are reported in the official reports of the BOARD. The foregoing can be found at Mid-America Machinery Company 258 N.L.R.B. No. 44 (1981).

## IV. STATEMENT OF THE JURISDICTION OF THIS COURT

The jurisdiction of this Court is invoked by virtue of the terms of 28 U.S.C., Section 1254, which authorizes this Court to review judgments of the courts of appeals by way of a writ of certiorari granted upon the petition of

any party. On August 25, 1983 the United States Court of Appeals for the Seventh Circuit issued its order in this proceeding. Thereafter, on November 9, 1983, that Court denied the petition for reconsideration filed by MID-AMERICA MACHINERY COMPANY. On February 9, 1984, upon application made to it, this Court granted MID-AMERICA MACHINERY COMPANY an extension of time to and including March 8, 1984 for filing with this Court a petition for a writ of certiorari.

## V. STATUTES WHICH RELATE TO THE SUBJECT MATTER OF THIS PETITION

The question presented to this Court relates to the proper exercise of the remedial powers granted to the NATIONAL LABOR RELATIONS BOARD under the

terms of Section 10(c) of the "National Labor Relations Act" [29 U.S.C., Section 160(c)]. The text of the foregoing statute is set forth in the appendix to this Petition.

## VI. STATEMENT OF THE CASE

### A) BACKGROUND OF PROCEEDINGS BEFORE THE NATIONAL LABOR RELATIONS BOARD AND THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The judgment for which review is sought arises out of a set of facts having its genesis in an incident that occurred in September of 1978 when Robert Swaggerty, a striking employee of MID-AMERICA MACHINERY COMPANY ["COMPANY"], requested reinstatement to his position of employment. The COMPANY refused Mr.

Swaggerty's request and he thereafter filed an unfair labor practice charge against the COMPANY with the NATIONAL LABOR RELATIONS BOARD ["BOARD"]. The Office of the General Counsel of the BOARD issued a complaint which was answered by the COMPANY. A trial was held on January 10, 1979 before an Administrative Law Judge of the BOARD. On August 15, 1979 the Administrative Law Judge issued his decision and recommended order [see Gen. Coun. Ex. No. 1(a)]. The Administrative Law Judge concluded that the refusal of the COMPANY to reinstate Mr. Swaggerty to his position of employment constituted a violation of Sections 8(a)(1) and 8(a)(3) of the "National Labor Relations Act" ["ACT"]. To remedy that misconduct he recommended that the COMPANY be required to: 1) post certain notices at

conspicuous places within its facility; 2) offer Mr. Swaggerty full and immediate reinstatement to his former position; 3) preserve and make available to agents of the BOARD for their examination pertinent payroll records; 4) cease any course of conduct constituting a violation of the ACT; and 5) pay to Mr. Swaggerty backpay [In accordance with the customary practice of the BOARD, no evidence was received nor finding made as to the amount of backpay which would properly be owing to Mr. Swaggerty because of the COMPANY's unlawful conduct. All issues relating to the amount of the backpay award were reserved until such time as an order of the BOARD became final and enforceable].

The COMPANY took exception to the decision of the Administrative Law Judge through appropriate submissions to the

BOARD. On December 28, 1979 the BOARD entered a decision and order affirming the findings and conclusions of the Administrative Law Judge [The decision of the BOARD is reported at 246 NLRB No. 153]. On October 30, 1980 the United States Court of Appeals for the Seventh Circuit entered an order affirming the decision reached by the BOARD [The order issued by the Court without opinion is reported at 639 F. 2d. 786].

Following the entry of judgment by the Court of Appeals the COMPANY extended to Mr. Swaggerty an unconditional offer of reinstatement to employment [see Gen. Coun. Ex. No. 5]. It complied with all other mandates imposed upon it under the terms of the BOARD's order except for the payment of backpay accruing to Mr. Swaggerty during the

period of time the COMPANY had refused to reinstate him to employment.

On December 19, 1980 the General Counsel issued a backpay specification [see Gen Coun. Ex. No. 1(c)]. In that specification the General Counsel defined the backpay period to be one commencing on September 8, 1978 and extending to November 14, 1980. The General Counsel, in his backpay specification, alleged that the gross amount owing to Mr. Swaggerty by virtue of the unlawful conduct of the COMPANY was the sum of Nine Thousand Nine Hundred Thirty and 60/100 Dollars ($9,930.60) together with interest accruing on that sum. In its answer to the backpay specification the COMPANY generally concurred with the General Counsel's methodology for calculating the gross backpay owing to Mr. Swaggerty.

However, it raised in its answer the affirmative defense that during the backpay period Mr. Swaggerty: 1) failed to accept substantially equivalent employment; 2) failed to diligently search out alternative employment; 3) voluntarily quit alternative employment; or 4) failed to exercise reasonable diligence to retain alternative employment once it was acquired [see Gen. Coun. Ex. No. 1(d) and 1(f), and Tr. 7 & 8].

In the proceeding before both the BOARD and the Court of Appeals the COMPANY raised several instances in which Mr. Swaggerty failed to mitigate his potential damage. In this proceeding the COMPANY addresses Mr. Swaggerty's failure to minimize his wages lost only with respect to his loss of interim employment.

On February 2, 1981 a hearing was held on the backpay specification before an Administrative Law Judge of the BOARD. At the conclusion of that trial the case was taken under advisement and, on June 8, 1981, the Administrative Law Judge rendered a decision and recommended order. In his decision the Administrative Law Judge found against the Respondent and recommended that the Respondent pay to Robert Swaggerty net backpay in the sum amount of $9,930.62 [see Appen. 6-14].

The Respondent filed with the BOARD a timely exception to the decision of the Administrative Law Judge. On September 28, 1981 a three member panel of the BOARD adopted the decision and recommended order of the Administrative Law Judge. Following receipt of the order of the BOARD the COMPANY petitioned

for reconsideration. The COMPANY's motion was denied by the BOARD on December 17, 1981.

It is from the foregoing proceedings that this case comes before this Court.

## B. STATEMENT OF THE PERTINENT FACTS

MID-AMERICA MACHINERY COMPANY is a Delaware corporation. Its principal place of business is located in Virden, Illinois. At all times pertinent to this case it engaged in the business of purchasing, renovating and selling used heavy construction equipment and parts.

In 1976 Robert Swaggerty became an employee of the COMPANY. During the term of his employment he was the COMPANY painter and served as a mechanic's helper [see Res. Ex. No. 6; and Tr. 32-34].

In June of 1978 Mr. Swaggerty participated in a labor strike against the COMPANY organized by a union seeking recognition as the bargaining representative of the COMPANY's shop employees. The strike extended throughout the Summer of 1978. In September of 1978 Mr. Swaggerty applied to the COMPANY for reinstatement to employment. Within several days of the date his written application for reinstatement was received, an officer of the COMPANY informed Mr. Swaggerty that his application had been rejected. In November of 1980, following the litigation before both the BOARD and the Court of Appeals concerning the lawfulness of the COMPANY's refusal to make employment available to him, the COMPANY offered Mr. Swaggerty full and immediate reemployment to his former position.

On April 2, 1979, approximately seven months following the COMPANY's refusal to reinstate him to employment, Mr. Swaggerty became an employee of Simplex, Inc. at its facility in Springfield, Illinois [Res. Ex. No. 11; Tr. 24].

On August 9, 1979 Mr. Swaggerty received a warning notice from Simplex, Inc. In that notice, which was signed by both his Supervisor and Department Head, he was informed that the work performed by him was below company standards [Res. Ex. No. 13]. On August 30, 1979 Mr. Swaggerty received a second warning notice. This notice was again signed by both his Supervisor and Department Head. The notice on its face indicates that Mr. Swaggerty refused to sign it. The nature of the infraction called to Mr. Swaggerty's attention in

that notice related to various defects in his work [Res. Ex. No. 14]. On October 17, 1979 Mr. Swaggerty received a third and final warning notice. The notice indicated that Mr. Swaggerty had poor attendance at work resulting in a low level of production [Res. Ex. No. 15]. On November 5, 1979 Mr. Swaggerty was given notice by Simplex, Inc. that his employment was being terminated effective November 7, 1979 [Res. Ex. No. 16]. Multiple reasons were given on the face of the notice for the termination, including absenteeism, poor work quality, bad attitude and the engagement in drunk and disorderly conduct.

At the time of trial Wanda Prosser, the Personnel Manager for Simplex, Inc., testified concerning the procedure employed by that firm for disciplining

its employees. When the firm develops a concern regarding the performance of an employee, the employee's Supervisor, Department Head and the Personnel Manager meet with the employee and discuss areas in which the employee's work need be improved. If, following several informal meetings, the employee makes no apparent improvement, a warning notice is given to the employee. The warning notice is signed by the employee's Department Head, Supervisor and sometimes the employee. The employee receives a copy of the notice and a copy is placed in the employee's personnel file. The employee is afforded three warning notices. If, following receipt of the third warning notice, the employee's work performance has not improved, he is terminated [Tr. 70 & 71].

At trial Mr. Swaggerty denied on the date of his termination from Simplex, Inc. that he was intoxicated [Tr. 88 & 89]. He did, however, acknowledge that he was fired from his employment with Simplex, Inc. He did not deny either that he had been guilty of excessive absenteeism or that the quality of his work was below company standards. He did not deny that his productivity at work was below the standards of the company. He admitted that he had been tendered several written disciplinary warnings [Tr. 89, 95 & 96]. No evidence was received at trial indicating that the work required of Mr. Swaggerty in connection with his employment for Simplex, Inc. required skills or capabilities which he, because of a lack of talent or vocational training, was unable to perform.

Following the termination of his employment with Simplex, Inc. Mr. Swaggerty was unemployed for several months until the early portion of the year 1980.

## C. DECISION OF THE BOARD

One of the affirmative defenses raised by the COMPANY to the backpay specification related to the circumstances giving rise to Mr. Swaggerty's termination from employment with Simplex, Inc. Specifically, the COMPANY contended that Mr. Swaggerty's termination from employment with that firm evidenced a failure on his part to exercise reasonable diligence to mitigate his wage losses during the backpay period.

In his decision and recommended

order the Administrative Law Judge rejected this contention of the COMPANY and held that the circumstances giving rise to Mr. Swaggerty's severance from employment with Simplex, Inc. were not sufficient grounds for reducing the backpay obligation which is otherwise owing by the COMPANY to him. In reaching this position, the Administrative Law Judge concluded as follows:

> "However, the discharge of a discriminatee for cause by an interim employer who has found his job performance to be unsatisfactory does not constitute a willful loss of earnings on the part of the discriminatee in the absence of an offense involving moral turpitude". [see Appen. 12].

The opinion and recommended order of the Administrative Law Judge was adopted by the BOARD [see Appen. 15-17].

The decision of the BOARD was

affirmed on appeal by the United States Court of Appeals for the Seventh Circuit. In its opinion the Court held that the discharge of Mr. Swaggerty from employment for absenteeism, poor quality of work and a bad attitude was not sufficient to deny him lost wages for the period of time following his termination from Simplex, Inc. [see Appen. 24].

It is from the foregoing set of facts that the COMPANY now petitions this Court for the issuance of a writ of certiorari.

## VII. STATEMENT SETTING FORTH THE BASIS FOR FEDERAL JURISDICTION BEFORE THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

This proceeding came before the United States Court of Appeals for the

Seventh Circuit by way of a petition of the BOARD seeking the enforcement of its administrative order. Section 10(e) of the "National Labor Relations Act" [29 U.S.C., Section 160(e)] vests with the Court of Appeals the jurisdiction to enter judgments enforcing the orders of the BOARD.

## VIII. ARGUMENT

Through this Petition the Court is being asked to consider the extent of the BOARD's discretion in exercising its remedial powers to impose backpay sanctions against firms which have committed unfair labor practices and the manner in which that discretionary authority should be circumscribed by the legal principle of mitigation of damages. Specifically, the Court's attention is

addressed to the question of whether a backpay order is appropriate when it imposes an obligation to pay wages during a time period that follows the loss by a discriminated employee of his interim employment through some fault of his. May the BOARD properly impose upon an employer the obligation to pay an employee for wages lost after that employee for cause lost employment not because he lacked the training, skills or vocational qualifications for employment with the interim employer, but rather because he failed to conform to the standards of conduct which the interim employer set for its employees?

In the instant case, Robert Swaggerty, an employee of the COMPANY who was unlawfully discharged from employmnt, did, following his discharge,

secure interim employment. During a period approximating two months in length, Mr. Swaggerty was subjected to progressive discipline by his interim employer because of his failure to follow certain rules of conduct prescribed by it. He was given three warning notices in which he was criticized for excessive absenteeism, an inadequate level of work productivity, inferior quality of workmanship and a less than satisfactory attitude toward his employment. No evidence was presented indicating that Mr. Swaggerty lacked the training, skills or other vocational requirements necessary to enable him to satisfactorily perform the work he was hired to engage in with the interim employer. No explanation was offered for his absenteeism and low production output. He was given three warnings and three opportunities to correct his work

and conform to the standards imposed by his employer. He chose not to do so and was subsequently terminated from his employment for multiple reasons.

While Mr. Swaggerty's conduct with his interim employer may not have involved actual misfeasance, malfeasance or moral turpitude on his part, there can be no doubt that he failed to exercise a reasonable degree of effort to conform his conduct to the expectations his interim employer set for its employees. This Court is being asked to consider whether an award of backpay by the BOARD to Mr. Swaggerty covering the time period following his loss of interim employment for the reasons narrated above is an abuse of the discretion given to the BOARD under the terms of Section 10(c) of the ACT.

The foregoing Section of the ACT empowers the BOARD, in imposing remedies for the violation of the ACT by employers, to require an employer to pay a discriminated employee for wages lost because of the employer's improper conduct. Through this power the BOARD is given authority to effectuate the remedial purposes of the ACT.

This Court has in the past addressed the question of how the BOARD's remedial powers in Section 10(c) of the ACT in awarding backpay are to be circumscribed and governed by the principle of mitigation of damages.

In Phelps Dodge Corporation v. National Labor Relations Board 113 F. 2d. 202 (2nd Cir. 1940), the Court of Appeals for the Second Circuit was called upon to construe the extent of the remedial powers of the BOARD in awarding backpay to individuals who had:

1) been unlawfully discriminated against through the loss of their employment; 2) secured interim employment; and 3) voluntarily chose to surrender that interim employment. The Court recognized the inherent statutory power of the BOARD to assess backpay relief in favor of employees who had been unlawfully discriminated against by an employer. The Court reasoned, however, that backpay relief was not appropriate to employees who had secured interim employment and voluntarily relinquished that employment. In discussing the powers of the BOARD within the context of Section 10(c) of the ACT, the Court stated as follows:

> "There is no reason to suppose that Congress intended to have those who had unlawfully been deprived of their jobs maintained in idleness beyond the period when they had an opportunity to do work they were fitted to perform. They were

> bound to use reasonable efforts to find work and to keep employed. It is only to the extent that their earnings were diminished after they made such efforts that they are entitled to be made whole. The same rule that applies to a discharged employee who sues for a breach of contract is applicable to them." [see P. 206]

On appeal to this Court through the application of a writ of certiorari the BOARD challenged the rule adopted by the Court of Appeals set forth above [see Phelps Dodge Corporation v. NLRB 313 U.S. 177, 85 L. Ed. 1271 (1941)]. This Court affirmed the holding of the Court of Appeals and commented as follows:

> "Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the BOARD enforces. Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker, but also for losses which he willfully incurred."

The concept of willful loss of earnings adopted by the Court in

Phelps Dodge arose from a case containing a set of facts in which an employee failed to exercise reasonable effort to keep employed by voluntarily surrendering interim employment.

In National Labor Relations Board v. Seven-Up Bottling Company of Miami, Inc. 344 U.S. 344, 97 L. Ed. 377 (1953), this Court charged the BOARD, in performing its task of implementing remedies under Section 10(c) of the ACT through the assessment of backpay, to impose backpay only after employing the principles of law governing the concept of mitigation of damages [see 344 U.S. at P. 346].

The principle of mitigation of damages is an old and well established axiom of the common law of contracts. The principle governs the measure of

damages assessable by virtue of the breach of employment agreements as well as breaches of other contractual undertakings. In his treatise, Professor Williston recognized that while the law does not penalize an individual who does not make effort to minimize the damage occasioned to him by virtue of the breach of an employment agreement, it does not compensate him for harm occurring by virtue of that breach which would not have occurred to a reasonable man standing in his place. A person suffering damage due to the breach of an employment agreement is required to exercise reasonable effort to minimize the extent of the damages sustained by him in searching out and retaining alternative forms of employment [see Williston On Contracts, Third Edition, Section 1359].

Relying upon the common law principle of mitigation of damages and the rule articulated by this Court in both Phelps Dodge Corporation (op. cit. 1940) and Seven-Up Bottling Company, Inc. (op. cit. 1953), the lower courts of appeals initially applied the common law concept of mitigation of damages in evaluating the propriety of backpay awards formulated by the BOARD in furtherance of the powers granted to it by the terms of Section 10(c) of the ACT. In so doing, the Courts seemed to recognize the principle that a backpay award computed without taking into consideration the common law mitigation of damages concept was one punitive in nature that extended beyond the proper purposes underlying the ACT [see National Labor Relations Board v. Suburban Lumber Company 121 F.

2d. 829 (3rd Cir. 1941); NLRB v. Madison Courier, Inc. 472 F. 2d. 1307 (D.C. Cir. 1972); and J. H. Rutter Rex Manufacturing Company, Inc. v. NLRB 473 F. 2d. 223 (5th Cir. 1973)].

The great majority of the decisions of the lower courts which have discusssed the concept of mitigation of damages in the context of the formulation of backpay orders by the BOARD have dealt with fact situations in which an employee either failed with reasonable diligence to search out interim employment or voluntarily relinquished interim employment once secured. There has been little guidance from the higher courts applying the concept of mitigation of damages in reviewing backpay orders of the BOARD in situations in which an

employee was terminated from interim employment for cause.

The limited guidance received from the higher courts concerning this issue has generally emanated from the enforcement without opinion of decisions of the BOARD imposing backpay obligations upon the employer.

Through a series of cases the BOARD has embarked upon the development of a rule of law which limits the application of the mitigation of damages principle in the formulation of backpay relief to persons discharged from interim employment.

In Aircraft And Helicopter Leasing And Sales, Inc. 227 N.L.R.B. No. 92, the BOARD refused to deduct from a backpay award wages covering a period of time

following the employee's discharge from interim employment because of absenteeism. The BOARD reasoned that, absent a showing that the absenteeism record of the employee with the unlawful employer was any different from the absenteeism record of the employee with the interim employer, no willful loss of earnings did arise. Notwithstanding the specific finding that the employee was not considered suitable because of his absenteeism for work with the interim employer, the BOARD refused to hold that this constituted idleness since no evidence was presented that the absenteeism was either wilful or without excuse [The decision of the BOARD was enforced in NLRB v. Aircraft And Helicopter Leasing And Sales, Inc. 570

F. 2d. 351 (9th Cir. 1977)]. Similarly, in Webb Manufacturing, Inc. 174 N.L.R.B. No. 7, the BOARD refused to deduct from a backpay award earnings lost by an employee through his discharge from employment with an interim employer, reasoning that there could be infinite possibilities why an employee was discharged from interim employment which might not justify the reduction of a backpay award [The decision of the BOARD was enforced in NLRB v. Webb Manufacturing, Inc. 421 F. 2d. 848 (6th Cir. 1970)].

In Barberton Plastics Products, Inc. 146 N.L.R.B. No. 54 (1964), the BOARD refused to deduct from a backpay award otherwise accruing to a discriminated employee monies covering a time period

following the employee's discharge for cause from interim employment. In justifying its conclusions, the BOARD reasoned that the conduct of the employee giving rise to his discharge from interim employment "involved no moral turpitude nor any such misfeasance or malfeasance as to render him unemployable by the respondent" [see P. 396]. Finally, the BOARD, in the instant case, has articulated the principle that a backpay award should not be adjusted by removing wages which would have been paid to the employee for a time period following his discharge from interim employment unless that discharge was motivated by conduct on the part of the employee rising to the level of moral turpitude.

The foregoing cases demonstrate in

vivid fashion that both the BOARD and the courts of appeals have, in enforcing the decisions of the BOARD, emasculated the principle of mitigation of damages as originally articulated by this Court in its decision in Phelps Dodge Corporation (op. cit. 1940).

Accordingly, an uncertainty in the federal labor laws does now exist concerning the proper standards which should govern the BOARD in computing backpay relief under Section 10(c) of the ACT when an employee is discharged for cause from interim employment. The rationale adopted in the Phelps Dodge (op. cit. 1940) case and the principle of mitigation of damages which was mandated by this Court in Seven-Up Bottling Company of Miami, Inc. (op. cit. 1953) as a doctrine applicable to the formulation of backpay relief would

seem to suggest that the loss of interim employment, if motivated because of some conduct on the part of the employee amounting to a failure to exercise a reasonable degree of effort to satisfy the employment requirements of the interim employer, would constitute willful idleness barring him from backpay relief for the period of time following his discharge from interim employment.

However, the case law developing through the decisions of the BOARD referred to above and the enforcement of those decisions by the courts of appeals suggest that a different rule may well apply. A rule requiring that an employee must be guilty of misfeasance, malfeasance or moral turpitude before his backpay award could be tolled by virtue of his loss of interim employment.

The issue addressed above is important to the orderly development of the body of federal law regulating labor management relations. The body of law developed by the BOARD and enforced by the courts of appeal appears to be divergent and in conflict with the rules earlier adopted by this Court. Applying the principles of Rule 17 of the Rules of the Supreme Court, the issue presented to this Court for its consideration through this Petition is ripe for consideration by this Court and merits its attention.

Accordingly, the Petitioner, MID-AMERICA MACHINERY COMPANY, respectfully requests that this Court grant its petition for a writ of certiorari.

MID-AMERICA MACHINERY COMPANY

BY:_____

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# APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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29 USCS Section 160 (c)

Reduction of testimony to writing--Findings and order of Board. The testimony taken by each member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its finding of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement

of employees with or without back pay, as will effectuate the policies of this Act [29 USCS Sections 151-158, 159-168]: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2) [29 USCS Section 158(a)(1), (2)], and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such

person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner

or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR

RELATIONS BOARD

CASE 14-CA-11867

MID-AMERICA MACHINERY COMPANY

and

METAL AND MACHINERY WORKERS

INDUSTRIAL UNION NO. 440, affiliated

with INDUSTRIAL WORKERS OF THE WORLD

SUPPLEMENTAL DECISION IN BACKPAY

PROCEEDINGS

Statement of the Case

LAWRENCE W. CULLEN, Administrative Law Judge: This supplemental proceeding was heard before me on February 2, 1981, at St. Louis,

Missouri, to determine the amount of backpay due to discriminatee Robert Swaggerty under a Decision and Order issued by the National Labor Relations Board and enforced by the Court of Appeals for the Seventh Circuit on October 30, 1980, wherein Respondent was found to have unlawfully refused to reinstate Swaggerty pursuant to his unconditional offer to return to work following an unfair labor practice strike engaged in by Swaggerty and other employees against the Respondent. The issues in the proceeding are joined by the Backpay Specificaion of the General Counsel issued on December 19, 1980, and the answer and supplemental answer of Respondent as amended at the hearing.

Upon the record made before me and my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondent, I make the following:

Findings and Conclusions of Law

In Administrative Law Judge Richard L. Denison's August 15, 1979 Decision and his Order adopted by the Board, Respondent was found to have violated Section 8(a)(1) and (3) of the Act by "failing and refusing to reinstate unfair labor practice striker Robert Swaggerty pursuant to his September 8 (1978) unconditional offer to return to work..." Respondent was ordered to:

"Offer Robert Swaggerty immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, dismissing, if necessary, any person hired on or after June 12, 1978, and make him whole in the manner set forth in the section of this Decision entitled 'The Remedy.'"

There are three basic issues set out by the Respondent in its answer and argued in its brief. Each will be treated separately.[2]

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2 In its answer the Respondent admitted the propriety of the formula for the calculation of the gross backpay amounts. In appendix A of the backpay specification General Counsel listed the quarterly interim earnings of discriminatee Swaggerty during the backpay period set out in Appendix A. Respondent offered no evidence of any additional quarterly interim earnings by Swaggerty. Appendix B is a calculation of the average hours worked by employees performing similar work during the backpay period by quarter. Respondent does not dispute these figures which were derived from its records, but disputes the commencement and ending point of the backpay period. Respondent also disputes the interim expenses to be set off against interim income as set out in appendix A. Respondent also raises the issue of willful idleness as an affirmative defense.

1. The Appropriate Commencement Date of the Backpay period and the Date on Which Bakpay was Tolled

(a) Commencement date

The Administrative Law Judge found that on September 8, 1978, Swaggerty left a signed note with the secretary of Respondent's manager, Jabusch, at Respondent's office and offered to return to work "without conditions or stipulations." He also found that Jabusch read the document when he returned to the office that evening, but did not respond to Swaggerty over the weekend, and Swaggerty then reappeared the following Monday (September 11, 1978) and inquired whether he could have his job back, and was then told by Jabusch that he had no need for labor, he had hired another laborer and had no

other opening. The Respondent argues from this finding that the Administrative Law Judge concluded that the date of the discriminatee's unconditional offer of reinstatement was on September 11, 1978, rather than September 8, 1978. However, the Respondent makes no mention of the specific conclusion of law of the Administrative Law Judge in item number 4 under "Conclusions of Law" on page 7 of his Decision [G.C. Exhibits 1(a)] wherein the administrative law judge concluded that Swaggerty made an unconditional offer to return to work on September 8 (1978).

I find from the foregoing that the commencement date of the backpay period was found by the Administrative Law Judge to be September 8, 1978, and this finding was adopted by the Board and

ultimately by the Court of Appeals in its enforcement order. Accordingly, I find that the principle of res judicata applies and this issue may not be relitigated in a subsequent backpay proceeding. See Schorr Stern Food Corp. 248 NLRB 292 (1980); See also Brown and Root Inc., 132 NLRB 486, 491 (1961), enf'd. 311 F. 2d 447, 451 (8th Cir., 1963). However, in the event that the Board concludes this issue should be decided in this proceeding, I also find that September 8, 1978, is the date on which the discriminatee made an unconditional offer of reinstatement and is the appropriate date for the commencement of the backpay period. It is undisputed that on September 8, 1978, Swaggerty delivered a note to Respondent's secretary in the absence of Respondent's

manager, Jabusch, and that the note was read by Jabusch later that evening with no further action having been taken by Respondent until Swaggerty once again made his offer on September 11, 1978. Under these circumstances I find that Swaggerty made an unconditional offer to return to work, which offer was communicated to Respondent on September 8, 1978, and that September 8, 1978, is the appropriate date for the commencement of the backpay period.

(b) The ending date of the backpay period

The General Counsel in its backpay specification alleges that the backpay "ends November 14, 1980, the date Respondent made a full and unconditional offer of reinstatement to discriminatee

Swaggerty." Respondent denies this allegation and argues that the proper date should be November 6, 1978, the date of the letter which the Respondent tendered to Swaggerty, in care of Mr. Roy Hayden, the compliance officer for Region 14 of the National Labor Relations Board. The letter to Swaggerty was enclosed with another letter to Hayden from James P. Baker, Esquire, attorney for the Respondent, wherein Baker stated:

> You will recall that Mr. Swaggerty did remove himself from the State of Illinois. Because my client does not now know his current address, we are sending the letter in your care and trust the backpay period will toll on the date of the letter rather than the date it is actually received by Mr. Swaggerty.[3]

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3 The two letters were attached and identified and received in evidence as G.C. Exhibit 5.

General Counsel contends that the appropriate date for the ending of the backpay period is November 14, 1980, set out in the backpay specification as the date on which the discriminatee actually received the offer by Respondent. The General Counsel argues that Respondent did not exercise due diligence as it did not mail the letter to the last known address of the discriminatee or did not, in the alternative, seek a recent address from the General Counsel and mail the offer of reinstatement directly to Swaggerty. General Counsel also argues that the Board is not the Respondent's agent for purposes of the offer of reinstatement.

Under ordinary circumstances, a letter of reinstatement mailed to the

last known address of the employee constitutes a bona fide offer and tolls the employer's backpay obligations. See Marlene Industries Corporation, 234 NLRB 285 (1978). However, this rule is by no means without exceptions and it has been held that the mailing of the letter of reinstatement to the last known address may not operate to toll backpay when the employer had other means available to notify the employee. See Jay Company, Inc., 103 NLRB 1645 (1953), enf'd 227 F.2d 416 (9th Cir., 1954). In the instant case, the Employer chose to send the offer of reinstatement to Compliance Officer Hayden and thus relied on the General Counsel to relay the offer to Swaggerty. This procedure inevitably delayed the receipt of the letter by Swaggerty. The exact date on which

Hayden forwarded the letter to Swaggerty is also uncertain although it is admitted in the backpay specification that Swaggerty received the letter on November 14, 1980. Under these circumstances I find that Respondent should bear the consequences of its conduct in the original commission of the violation of the Act rather than Swaggerty and that any ambiguity should be resolved against Respondent. See J.H. Rutter-Rex Manufacturing Company, Inc., 158 NLRB 1414 (1966) and McCann Steel Company, Inc., 212 NLRB 394 (1974) and Marlene Industries Corporation, supra. Accordingly, I find that November 14, 1980 is the appropriate date for the ending of the backpay period.

2. The Offset of Travel Expenses Against Interim Earnings

During a portion of the backpay period the discriminatee was employed by Simplex Incorporated (Simplex) in Springfield, Illinois, and commuted from his parent's home in Girard, Illinois, a 60-mile roundtrip for the entire period of employment at Simplex, except the intial three weeks when he lived in Springfield. As an employee of Respondent, Swaggerty had lived in Girard, Illinois and was required to make a roundtrip of only eight miles to report to work with Respondent. The additional cost of the roundtrip to Springfield from Girard, Illinois is listed in Appendix A as a setoff against interim income earned by him at Simplex. The Respondent contends that this setoff is improper as Swaggerty

lived in Springfield at the time he originally obtained his position at Simplex, but subsequently moved back to Girard shortly thereafter as a result of personal reasons, and that the roundtrip commute from Girard to Springfield, Illinois was thus the result of his personal decision rather than attributable to Respondent. Respondent also introduced into evidence a copy of a bankruptcy petition filed by Swaggerty and appears to argue that Swaggerty actually resided at the Springfield address for a longer period as a result of Swaggerty's listing in the bankruptcy petition a lease obligation at the Springfield address as a possible liability. Swaggerty testified that the lease obligation, if any, was his wife's. I credit Swaggerty's testimony in this

regard and find that the listing of the lease obligation in the bankruptcy does not support Respondent's position.

I credit Swaggerty's testimony that he lived in Girard, Illinois for the entire period of his employment at Simplex except for the first three weeks of his employment at Simplex and that he incurred additional travel expenses as a result of the 60-mile roundtrip. Although the circumstances of Swaggerty's move back to Girard, Illinois were admitted by Swaggerty to have been personal, it is also clear that Swaggerty would not have incurred these additional travel expenses if he had been traveling from Girard to his job with Respondent in Virden, Illinois rather than to Simplex in Springfield, Illinois. Thus, the additional travel expenses are a

direct result of Respondent's unlawful actions in refusing to reinstate Swaggerty. It should also be noted that Respondent derived the benefit of a decrease in its backpay liability during the period of Swaggerty's employment at Simplex. Travel expenses required for interim employment which exceed travel expenses to and from the Respondent Employer's place of business are proper items to be set off from interim earnings. See The Richard W. Kaase Company, 162 NLRB 1320, 1326 (1967). See also Gary Aircraft Corporation, 210 NLRB 555, 558 (1974). Accordingly, I find that the additional travel expenses as set out in the backpay specification were properly set off against the interim earnings of Swaggerty at Simplex.

3. The Issue of Willful Idleness

Respondent asserts as an affirmative defense that Swaggerty did not make reasonably diligent efforts to search for and retain alternative employment during the backpay period. At the outset, although the General Counsel has the burden to establish the gross backpay, the interim expenses to be set off against the gross backpay and the net backpay amount, Respondent bears theburden of establishing its affirmative defense of willful idleness. See Sioux Falls Stock Yards Company, 236 NLRB 543 (1978).

As previously found, the backpay period extends from September 8, 1978 to November 14, 1980, a period of slightly in excess of 26 months. Swaggerty was

unemployed from September 8, 1978 until April 2, 1979 when he commenced employment with Simplex. During a portion of this period of unemployment Swaggerty attended the 1978 winter semester of the Wabash Valley College in Virden, Illinois in a program to prepare for employment in the coal mining industry. This quarter of study commenced December 1, 1978 and concluded in the latter part of February 1979. Swaggerty's schedule consisted of a 34 class hour per week program with morning sessions from 8:00 a.m. until 11:00 a.m., and evening sessions from 6:00 p.m. until 9:30 p.m. Swaggerty submitted quarterly reports to Region 14 in response to a backpay questionnaire. On the report for the period from September 8, 1978 to December 31, 1978, he wrote:

Unemployment for this period.
Unemployment Job Service Six Street
Springfield, Ill, (Each Week)

Peabody coal (company), Pawnee, Ill
freeman coal (company) Virden Ill
freeman coal (company) farmerville,
Ill once each month at the above
was told to keep checking back

Also checked on other place that I
can't recall they are on my unemployment
card that I sent in if you need
them in Springfield, Ill, was ready
to go to work at any time

On the report for the period from January 1, 1979 to March 31, 1979, he wrote:

Unemployment for the period

Same as first page (this was a
reference to the earlier report)

Swaggerty testified that during the period of instruction at Wabash College he sought work and would have accepted employment if he had obtained a position. During the period of unemployment betweeen September 8, 1979 to April 1,

1980 he applied for a job at "Juicy Rich" but did not take the job because it paid "two dollars and something" less than his unemployment benefits whereas he had earned $4.75 per hour while employed by Respondent. During this period of unemployment he consulted newspaper advertisements and applied for the position at Simplex which he learned of through a newspaper advertisement. He missed a class in February to interview with Simplex. He also testified that he asked to be excused from a class to go to Carbondale, Illinois to apply at a mine.

Respondent produced testimony and documentary evidence at the trial which showed that Swaggerty had filed an application for employment with Freeman Coal Company on August 2, 1978 and that

there was no record of his having updated his application since that time and that no application had been taken at that Company's Farmerville mine since 1971 and at its Virden mine since 1979. It also produced testimony and evidence that Swaggery had filed an application with the Peabody Coal Company on April 25, 1978 but that there was no record of his having since updated his application. Swaggerty did not testify concerning his application at Peabody Coal Company. Swaggerty testified that he did apply for work at Freeman Coal in Virden, Illinois and applied for construction work on the new mine Freeman Coal was building. He testified he went to Freeman Coal a number of times (approximately once a month) but that his application was never pulled.

Respondent's counsel also inquired of Swaggerty concerning whether he had applied with a number of employers near the vicinity of his home in Girard, Illinois but Respondent introduced no evidence whether these employers were hiring new employees during this period. I credit Swaggerty's testimony as set out above and as supported by the quarterly reports filed by him that he actively sought work during his period of unemployment between September 8, 1978 and April 2, 1979 when he commenced employment with Simplex. Although Swaggerty did not rebut the Respondent's evidence concerning his alleged failure to update his application at Peabody Coal Company, I do not find this compels an adverse inference against his position with respect to the remainder of his

testimony concerning his other efforts to secure employment. I find that Swaggerty did not remove himself from the job market by reason of his attendance at the Wabash Valley College and credit his testimony that he sought work during this period and would have taken a position if he had obtained one. I find that the position he refused at Juicy Rich was not substantially equivalent to the position he held while employed at Respondent. See FM Broadcasting Corp., 233 NLRB 326 (1977) wherein it was held that the discriminatee had not incurred a willful loss of earnings by his failure to take interim employment beyond the vicinity of the applicable labor market and at a lesser wage than he had earned while employed by the respondent employer.

Swaggerty was employed by Simplex from April 2, 1979 until November 7, 1979 when he was terminated. Respondent contends that Swaggerty's termination by Simplex should disqualify him from receipt of back pay from the date of his termination (November 7, 1979) until January 21, 1980 when he obtained other employment. However, the discharge of a discrimnatee for cause by an interim employer who has found his job performance to be unsatisfactory does not constitute a willful loss of earnings on the part of the discriminatee in the absence of an offense involving moral turpitude. See George A. Anglo d/b/a Kansas Refined Helium Company, 252 NLRB No. 162 (1980) and Barberton Plastics Products, Inc., 146 NLRB 393 (1964). In Swaggerty's case Respondent undertook to

show that the discriminatee was discharged for cause by Simplex as a result of absenteeism, poor work performance, bad attitude and an incident on the last day of his employment (November 7, 1979) allegedly involving drunkeness and disorderly conduct by Swaggerty on the premises of Simplex. This does raise an issue as to whether he was discharged for drunkeness so as to constitute a willful loss of employment. However, the proof offered by Respondent to this end consisted solely of business records (warning notices and a termination record which listed in typewriting "absenteeism, poor quality of work and bad attitude" and in handwriting "Drunk and Disorderly" as the reasons for his discharge). Alfred Steiner, the operations manager of Simplex who terminated

Swaggerty, did not testify and there was no testimony as to whether the conclusionary statements listed on the warning notices and the termination form concerning Swaggerty's job performance were true. The only witness produced by Respondent from Simplex was Wanda Prosser, the personnel manager who identified the records but who had no personal knowledge of Swaggerty's job performance prior to the date of his termination although she testified that on the date of his termination, she observed from across the street that Swaggety was drunk and disorderly. Swaggerty denies that he had been drinking that day. Under these circumstances I find that Respondent has not sustained its burden of proof and has not proven that Swaggerty failed to exercise due diligence in maintaining

his position with Simplex.

With respect to the period of unemployment from November 7, 1979 to January 21, 1980, Swaggerty testified that he moved to Kansas in November 1979 in a search for work and went to work for Restoration System Incorporated in early 1980 in Wichita, Kansas. The Respondent produced no evidence concerning this period with the exception of the quarterly report filed by Swaggerty with the National Labor Relations Board (Resp. Exh. 20). On this report Swaggerty wrote that he had looked for a job "in the paper" and at the employment office in Springfield, Illinois. I credit Swaggerty's testimony and I find that Swaggerty exercised reasonable diligence in seeking alternative employment during this period of unemployment.

I find, based on the above, that Respondent did not sustain its burden of proof and has not proven that Swaggerty failed to exercise reasonable diligence in seeking and maintaining alternative work throughout his period of unemployment during the backpay period. Rather, I credit Swaggerty's testimony that he sought alternative work and filed applications as set out above and I find that he was under no obligation to accept the position at Juicy Rich as it was not a substantially equivalent position to that which he held while employed at Respondent. I conclude that he was reasonably diligent in his efforts to secure employment. The law does not require that Swaggerty's search be an exhaustive one. See Sioux Falls Stock Yard Company, supra. Moreover,

Swaggerty's substantial period of employment during the backpay period attest to his efforts to seek alternative work. I also find that Respondent failed to prove that Swaggerty's discharge by Simplex constituted a willful failure to maintain alternative employment on the part of Swaggerty.[4]

Based upon the foregoing and the entire record in this proceeding, I find that the General Counsel has sustained its burden and has established the gross backpay, the interim expenses to be set off against the gross backpay and the net backpay amount. I find Respondent's net backpay liaility to the discriminatee,

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4 In view of my findings above, I do not find it necessary to make a determination concerning the General Counsel's alternative argument that Swaggerty's employment at Simplex was not substantially equivalent to his employment with Respondent.

Robert J. Swaggerty, totals $9,930.62 as computed in the backpay specification.

Upon the foregoing findings of fact, conclusions of law and the entire record, I make the following recommended:[5]

ORDER

Respondent, Mid-America Machinery Company, Virden, Illinois, its officers, agents, successors and assigns, shall pay Robert J. Swaggerty as net backpay the amount of $9,930.62. Interest is to be added as established in Florida Steel Corporation, 231 NLRB 651 (1977).[6]

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5 In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Supplemental Order herein shall, as provided by Section 102.48 of the Rules and Regulatons, be adopted by the Board and become its findings, conclusions and Supplemental Order, and all objections thereto shall be deemed waived for all purposes.

6 See, generally, Isis Plumbing & Heating Company, 138 NLRB 716 (1962).

There shall be deducted from the amount due any tax withholding required by law.

Dated Washington, DC June 8, 1981.

Lawrence W. Cullen

Administrative Law Judge

258 NLRB No. 44

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR

RELATIONS BOARD

CASE 14-CA-11867

MID-AMERICA MACHINERY COMPANY

and

METAL AND MACHINERY WORKERS

INDUSTRIAL UNION NO. 440,

AFFILIATED WITH INDUSTRIAL

WORKERS OF THE WORLD

SUPPLEMENTAL DECISION AND ORDER

On December 28, 1979, the National Labor Relations Board issued its Decision and Order[1] in the above-entitled

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1 246 NLRB No. 153.

proceeding, finding that Respondent had discriminatorily failed and refused to reinstate Robert Swaggerty to employment following receipt by it of an unconditional offer by Swaggerty to return to work, in violation of Section 8(a)(1) and (3) of the Act. The Board's order directed, among other things, that Respondent offer reinstatement to Robert Swaggerty and make him whole for losses as a result of this discrimination.

On October 30, 1980, the United States Court of Appeals for the Seventh Circuit enforced the Board's Order. Therafter, on December 19, 1980, the Regional Director for Region 14 issued a backpay specification and notice of hearing. A hearing was held on February 2, 1981, before Administrative Law Judge Lawrence W. Cullen to determine the amount of backpay due.

On June 8, 1981, the Administrative Law Judge issued the attached Supplemental Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[2]

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2 We note that in part 1(b) of his Decision, the Administrative Law Judge incorrectly stated that Respondent argued that the proper date on which it made a full and unconditional offer of reinstatement to Robert Swaggerty should have been November 6, 1978. This is a typographical error for November 6, 1980. The actual backpay period here extends from September 8, 1978 to November 14, 1980.

and conclusions of the Administrative Law Judge and to adopt his recommended Order.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Mid-America Machinery Company, Virden, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

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3 In accordance with his dissent in Olympic Medical Corporation, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

Dated Washington, D.C.

September 28, 1981

John H. Fanning, Member

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR

RELATIONS BOARD

CASE 14-CA-11867

MID-AMERICA MACHINERY COMPANY

and

METAL AND MACHINERY WORKERS

INDUSTRIAL UNION NO. 440,

AFFILIATED WITH INDUSTRIAL

WORKERS OF THE WORLD

ORDER DENYING MOTION

On September 28, 1981, a three-member panel of the National Labor Relations Board issued a Supplemental Decision and Order in the above-entitled proceeding in which it adopted the findings, conclusions and recommendations

of the Administrative Law Judge as contained in his Decision of June 8, 1981, and ordered that the Respondent take the action set forth in the recommended order of the Administrative Law Judge.

Thereafter, on October 19, 1981, the Respondent filed a petition requesting that the National Labor Relations Board reconsider the Supplemental Decision and Order.

The Board having duly considered the matter,

IT IS HEREBY ORDERED that the Employer's request for reconsideration be, and it hereby is, denied as it contains nothing not previously considered by the Board.

Dated Washington, D.C.,

December 17, 1981.

By direction of the Board:

Joseph E. Moore

Associate Executive Secretary

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

August 25, 1983

No. 82-1408

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

MID-AMERICA MACHINERY COMPANY,

Respondent.

Application for Enforcement of an Order of the National Labor Relations Board

This cause came on to be heard on the record from the National Labor Relations Board, and was argued by counsel. On consideration whereof, IT IS ORDERED AND ADJUDGED by this

Court that enforcement of the Board's order is GRANTED, with costs, in accordance with the order of this Court entered this date.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

August 25, 1983

No. 82-1408

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

MID-AMERICA MACHINERY COMPANY,

Respondent.

Application for Enforcement of an Order of the National Labor Relations Board

ORDER

At its present stage, this case merely involves the correctness of the National Labor Relations Board's

approval of an Administrative Law Judge's (ALJ) computation of backpay owed by respondent Mid-America Machinery Company of Virden, Illinois ("the Company"), to its former employee, Robert Swaggerty. On October 30, 1980, we entered an order affirming the Labor Board's decision that the Company had violated Section 8(a)(1) and 8(a)(3) of the National Labor Relations Act by not reinstating Swaggerty to his former position of employment. On June 12, 1978, Swaggerty went out on strike but unconditionally offered to return to his job on September 8, 1978. The Company refused his offer, and we enforced the Board's ensuing order directing the Company to offer Swaggerty reinstatement and to make him whole for earnings lost by reason of its failure to reinstate

him on September 8. 639 F. 2d. 786 (1980).

Swaggerty's backpay period began on September 8, 1978. He was unemployed for 7 months until April 2, 1979, when he started working for Simplex, Inc. in Springfield, Illinois. He worked for Simplex for 7 months until he was discharged on November 7, 1979. He was employed by Restoraton System, Inc. in Wichita, Kansas, on January 21, 1980, and was still employed there when the Company finally offered him reinstatement on November 14, 1980, thus ending the backpay period.

At the backpay hearing held before an ALJ on February 2, 1981, and thereafter the Company did not contest the formula the ALJ used to calculate the gross backpay figures. However, the Company

asserts that the ALJ's order that it pay Swaggerty $9,930.62[1] plus interest was improper because the ALJ should have reduced the backpay liability in three respects. The Board adopted the ALJ's order awarding backpay in the full amount, resulting in the Company's asking us to remand the case to the Board to reduce the award. We see no necessity for a remand. In critiquing the backpay calculations of the ALJ approved by the Board, we adhere to the standards of review recently set forth in National Labor Relations Board v. United Contractors Incorporated, ___ F. 2d ___, ___, slip op. 10-12 (7th Cir. 1983)

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1 The $9,930.62 consisted of the sum of Swaggerty's missing estimated gross backpay at the Company less his net interim earnings elsewhere. the dispute here concerns the Board's computation of his net interim earnings.

A. Board's Assessment Against Company of Travel Expenses Incurred by Swaggerty

While Swaggerty was employed by the Company, he resided in Girard, Illinois, which was four miles from the Company's place of business in Virden. After the Company refused him reemployment but a short time before he secured interim employment with Simplex, Inc. in Springfield, Swaggerty had moved to that city. At oral argument, Board counsel told us Swaggerty's move to Springfield a few weeks before commencing his Simplex job[2] was to find employment since he had unsuccessfully combed the Girard area

2 The exact date of his move to Springfield is unclear but it was apparently after his winter quarter at Wabash Valley College in Virden terminated on February 26, 1979.

for seven months. This was undisputed by Company counsel. Swaggerty was employed by Simplex from April 2, 1979, to November 7, 1979. Three weeks after he started working at Simplex, he moved back to his mother's and stepfather's home in Girard. His testimony stated that the decision to relocate to Girard was a personal one, requiring him to commute 30 miles each way to and from his employment with Simplex. The ALJ charged the Company with these travel expenses in computing the backpay award. The Company asserts that it should not be so assessed because that would be according punitive rather than remedial relief. However, as the ALJ concluded, "Swaggerty would not have incurred these additional travel expenses if he had been traveling from Girard to

his job with respondent in Virden, Illinois, rather than to Simplex in Springfield, Illinois," so that the additional travel expenses were linked to the Company's unlawful action in refusing to reinstate Swaggerty (App. 30). The Company cites no cases that support its position that Swaggerty was not entitled to credit against interim earnings the travel expenses from Girard to his Springfield job and back home. Indeed the pertinent cases hold that transportation expenses to and from interim employment, when they exceed the former employee's former costs of transportation, are properly deductible from interim earnings. The Richard W. Kaase Co., 162 N.L.R.B. 1320, 1326 (1967); East Texas Steel Castings Co., Inc., 116 N.L.R.B. 1336,

1341-1343 (1956), enforced 255 F.2d 284 (5th Cir. 1958), both recognizing that only net interim earnings computed after making allowance "for the expense of getting new employment which but for the discrimination would not have been necessary," are deductible, Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177, 198 n.7. Since Swaggerty's basic place of residence was in Girard, Illinois, except for the few weeks when he lived in his ex-wife's apartment[3] in Springfield while trying to find employment and while first working for Simplex, the Company cannot legitimately complain of its liability for these comparatively minor travel expenses ($561.60 or $9.03

3 Swaggerty and his former wife were evidently divorced in 1978 (Board Br. 19 n.6) and afterwards she rented an apartment in Springfield.

per working day in second quarter of 1979, $538.20 or $8.08 per working day in third quarter of 1979, and $257.40 or $10.30 per working day in fourth quarter of 1979, per App. 56).[4]

B. Board's Assessment Against Company of Swaggerty's Subsistence Allowance at Wabash Valley College

As noted, Swaggerty should have been reemployed by the Company on September 8, 1978, when he made an unconditional offer to return to work. Since the Company refused his offer, on November 27, 1978, he enrolled at the Wabash Valley College for the quarte commencing on December 1, 1978, through

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4 The working day figures assume 60 working days in each of the second and third quarters and only 25 in the fourth in view of Swaggerty's November 7, 1979, Simplex discharge.

February 26, 1979. The Company argues that the Board should have offset against the Company's backpay obligation the subsistence allowance he received while attending the college. The ALJ credited Swaggerty's testimony that during his term at Wabash Valley College he sought work and would have accepted employment and had already registered with the Illinois Unemployment Job Service. As the ALJ pointed out, the benefits Swaggerty received during his winter quarter at Wabash Valley College were not for services rendered and therefore not deductible as interim earnings. The course of instruction was taken to improve Swaggerty's work qualifications and the applicable precedents support the Board's ruling that educational benefits are not deductible as interim earnings.

Ozark Hardwood Co., 119 N.L.R.B. 1130, 1169 (1957), modified on other grounds, 282 F. 2d 1 (8th Cir. 1960); Deena Artware, Inc., 112 N.L.R.B. 371, 373 n.7 (1955), enforced, 228 F. 2d. 871 (6th Cir. 1955). The Company has not shown why this vocational aid should be considered earnings for services rendered, so that the Board's refusal to deduct this assuredly insignificant sum from the backpay due Swaggerty should not be upset.[5]

C. Wilful Idleness of Swaggerty Between Company's Refusal to Reinstate Him Until Employed by Simplex

After the Company illegally refused to rehire Swaggerty on September 8,

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5 The Company has not informed us of this amount, and it does not appear in the Appendix but was only for a three-month winter quarter.

1978, the Company states that it should not have to give him backpay until he was hired by Simplex on April 2, 1979, on the ground that he incurred a wilful loss of earnings by not making a reasonable effort to search out interim employment during that time. However, the ALJ credited Swaggerty's testimony that he was reasonably diligent in seeking alternative work during those 7 months. In order to improve his employment prospects, Swaggerty studied at Wabash Valley College for a 3-month quarter commencing December 1, 1978. He testified that he would have accepted employment during his course there. He also testified that between September 8 and his employment at Simplex, he applied for jobs at the Peabody Coal Co., the Freeman Coal Co. and the Juicy Rich

Co. in Springfield, and only turned down a position offered by Juicy Rich because it was not equivalent to his position with the Company and paid about $2 per hour less. There is no wilful loss of earnings just because an employee refuses or leaves employment which pays a lesser wage than earned while employed by respondent, FM Broadcasting Corp., 233 N.L.R.B. 326, 330 (1977).

Even though the Company points to certain factors supposedly undermining Swaggerty's testimony of diligence, his quarterly reports to the Board's regional office sufficiently support his testimony. In addition, he visited the Illinois Unemployment Job Service's Springfield, Illinois, office weekly until he was hired by Simplex in April 1979. He

also made job inquiries at Snell Bros. and Cruise Chevrolet in Virden, Illinois, where the Company is located. He sought jobs as well with Beatty Implement Company and Narmont Machinery Company in Auburn, Illinois, about 15 miles from his residence. He also visited mine operators at Carbondale, Illinois, with his stepfather, who was acquainted with some of them, and checked newspapers for job listings. He secured his Simplex job by answering a newspaper ad. Since exceptional circumstances are absent, we must accept the credibility resolutions of the ALJ in Swaggerty's favor. Electri-Flex Co. v. National Labor Relations Board, 570 F. 2d. 1327, 1331-1332 (7th Cir. 1978), certiorari denied, 439 U.S. 911. Consequently, the Company's charge that Swaggerty

made no genuine effort to obtain interim employment prior to April 2, 1979, when he was employed by Simplex cannot be accepted.

D. Wilful Idleness by Swaggerty Between Simplex's Discharge and His Next Job

The Company also contends that Swaggerty should be disqualified for backpay from November 7, 1979, when he was discharged from Simplex, until he obtained employment with Restoration System, Inc. in Wichita, Kansas, on January 21, 1980, a period of 10 weeks. But it is settled Board policy, approved judicially, that the discharge of an interim employee for unsatisfacory job performance does not constitute a wilful loss of earnings unless it evidences

lack of an honest good faith effort to earn a living. It is not enough that that effort proves unsuccessful. George A. Angle d/b/a Kansas Refined Helium Company, 252 N.L.R.B. 1156, 1162 (1980), enforced, 683 F.2d 1296, 1302 (10th Cir. 1982); Aircraft and Helicopter Leasing and Sales, Inc., 227 N.L.R.B. 644, 645 (1976), enforced, 570 F.2d 351 (9th Cir. 1977); Webb Mfg., Inc., 174 N.L.R.B. 37, 38-39 (1969), enforced 421 F.2d 848 (6th Cir. 1970); Barberton Plastics Products, Inc., 146 N.L.R.B. 393, 396 (1964), enforcement denied on other grounds, 354 F.2d 66 (5th Cir. 1966); Mastro Plastics Corp., 145 N.L.R.B. 1710, 1716-1717 (1964), enforced, 354 F.2d 170 (6th Cir. 1965) (but no backpay while 10 days in jail prior to discharge by interim employer).

It is true that Swaggerty received three warnings from Simplex, the first for poor quality work, the second for defective work, and the third for poor attendance. His November 7 discharge shows that it was for "absenteeism, poor quality of work and bad attitude." That is not sufficient to establish wilful idleness; Swaggerty was not required to succeed, nor was he required to be happy with his interim employment. The above-quoted accusations were typed on his discharge form on November 5, whereas the words "drunk and disorderly" were written in later because of his conduct at the November discharge interview. In these circumstances the Company concedes that "the record is relatively clear that it was not the intoxication which motivated the discharge ***"

(Br. 25). Moreover, Swaggerty was still at work with Restoration System, Inc. in Wichita when the backpay period ended eight months later, thus an additional indication that the Company had not proved that the discharge from Simplex amounted to wilful loss of earnings. Accordingly, the Company was not entitled to be relieved from liability for backpay for the 10 weeks between the Simplex discharge and the hiring by Restoration System, Inc.

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The Board's order of September 28, 1981, is hereby enforced in full.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

November 9, 1983

No. 82-1408

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

MID-AMERICA MACHINERY COMPANY,

Respondent.

Application for Enforcement of an Order of the National Labor Relations Board

ORDER

On consideration of the petition for reconsideration filed in the above-entitled cause by respondent, all of

the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for reconsideration be, and the same is hereby, DENIED.

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ALEXANDER L. STEVAS,
CLERK

No. 84-431

# In the Supreme Court of the United States

OCTOBER TERM, 1984

MID-AMERICA MACHINERY COMPANY, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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## QUESTION PRESENTED

Whether, in awarding backpay, the Board reasonably determined that a discriminatee's discharge from an interim job did not constitute a willful loss of earnings disqualifying him for backpay during a ten-week period until he found another job.

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# In the Supreme Court of the United States

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*v.*

NATIONAL LABOR RELATIONS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A46-A63) is not reported. The decision and order of the Board (Pet. App. A36-A40), including the decision of the administrative law judge (Pet. App. A5-A35), are reported at 258 N.L.R.B. 316.

### JURISDICTION

The judgment of the court of appeals (Pet. App. A44-A45) was entered on August 25, 1983. A petition for rehearing was denied on November 9, 1983 (Pet. App. A64-A65). On February 9, 1984, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including March 8, 1984, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. A1-A4.

## STATEMENT

1. The Board found that petitioner violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3), by discriminatorily failing to reinstate employee Robert Swaggerty following his unconditional offer to return to work after a strike.[1] The Board's order required petitioner to offer reinstatement to Swaggerty and to make him whole for losses suffered as a result of the discrimination. Following enforcement of the Board's order by the court of appeals on October 30, 1980, the Board began supplemental backpay proceedings to determine the amount owed. Pet. App. A36-A37.

2. Following a hearing the Board, adopting the findings and conclusions of the administrative law judge, determined that Swaggerty was entitled to backpay in the amount of $9,930.62 for the period from September 8, 1978, the date of his offer to return to work, until November 14, 1980, the date of petitioner's offer of reinstatement (Pet. App. A9-A16, A34, A36-A39). The Board rejected petitioner's contentions that Swaggerty failed to make reasonable efforts to obtain interim employment during parts of the backpay period and that the backpay award improperly required petitioner to compensate Swaggerty for certain commuting expenses incurred during an interim job (Pet. App. A17-A27).

In addition, the Board rejected petitioner's claim that Swaggerty's discharge from interim employment at Simplex, Inc. on November 7, 1979 disqualified him from

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[1]The Board's initial decision finding petitioner liable for these violations is reported at 246 N.L.R.B. 1176 (1979).

receiving backpay for the ten-week period following his discharge until he obtained a new job on January 21, 1980 (Pet. App. A28-A31). The Board acknowledged that Swaggerty had been warned on several occasions for "defective work," "work performance below company standards," and "poor attendance resulting in low work output," and that his termination notice listed "absenteeism, poor quality of work and bad attitude" as the reasons for discharge (*id.* at A29; RX 13-16).[2] The Board concluded, however, that "the discharge of a discriminatee for cause by an interim employer who has found his job performance to be unsatisfactory does not constitute a willful loss of earnings * * * in the absence of an offense involving moral turpitude" (Pet. App. A28). The Board found that, although the words "Drunk and Disorderly" were later handwritten on Swaggerty's termination records, and a company official testified that on the date of Swaggerty's discharge she observed from across the street that he appeared to be drunk, petitioner had failed to prove that Swaggerty was discharged for an offense involving moral turpitude so as to disqualify him for backpay (*id.* at A29-A30).[3] The Board found further that Swaggerty had exercised due diligence both in seeking employment before working for Simplex and in obtaining employment following his discharge (*id.* at A21-A27, A31). The evidence showed that following his discharge Swaggerty moved from Illinois to Kansas in order to find work and that he remained employed in Kansas from January 1980 until the backpay period ended in November 1980 (*id.* at A31).

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[2]"RX" references are to petitioner's exhibits introduced at the backpay hearing.

[3]Swaggerty testified that he had not been drinking that day (Pet. App. A30).

3. The court of appeals enforced the Board's supplemental backpay order in full (Pet. App. A46-A63). With respect to petitioner's claim concerning Swaggerty's discharge, the court stated that "it is settled Board policy, approved judicially, that the discharge of an interim employee for unsatisfactory job performance does not constitute a wilful loss of earnings unless it evidences lack of an honest good faith effort to earn a living" (*id.* at A60-A61). Noting that petitioner conceded that " 'it was not the intoxication which motivated the discharge,' " the court found that the evidence that Swaggerty may not have been successful at his work or happy about his job at Simplex was "not sufficient to establish wilful idleness" (*id.* at A62). It found further that the fact that Swaggerty remained at his subsequent job from January 1980 until the backpay period ended 10 months later was evidence that his discharge from Simplex did not reflect a lack of good faith effort to earn a living (*id.* at A63).

## ARGUMENT

The rule applied by the Board—that a discriminatee's discharge from interim employment does not disqualify him for backpay following the discharge absent an offense involving moral turpitude or lack of a good faith effort to earn a living—has been approved by every court of appeals that has considered it.[4] Consistent with the teachings of this Court, the Board, in awarding backpay, has broad discretion to make employees whole for losses actually suffered

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[4]See, *e.g.*, *George A. Angle d/b/a Kansas Refined Helium Co.*, 252 N.L.R.B. 1156, 1162 (1980), enforced, 683 F.2d 1296, 1302 (10th Cir. 1982); *Aircraft & Helicopter Leasing & Sales, Inc.*, 227 N.L.R.B. 644, 645 (1976), enforced, 570 F.2d 351 (9th Cir. 1978) (Table); *Webb Mfg., Inc.*, 174 N.L.R.B. 37, 38-39 (1969), enforced, 421 F.2d 848 (6th Cir. 1970); *Mastro Plastics Corp.*, 145 N.L.R.B. 1710, 1716-1717 (1964), enforced, 354 F.2d 170, 179 (2d Cir. 1965); see also *Barberton Plastics Products, Inc.*, 146 N.L.R.B. 393, 396 (1964), enforcement denied on other grounds, 354 F.2d 66 (6th Cir. 1965).

due to unlawful discrimination, but not for losses "willfully incurred." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197-198 (1941); see *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). Although discriminatees are required to exercise reasonable diligence in seeking and keeping interim employment, the Board's rule recognizes that jobs differ as to their inherent demands, that different employers have different standards, and that the wrongdoing employer bears the responsibility for subjecting a discriminatee to new conditions of interim work. See *Mastro Plastics Corp.*, 145 N.L.R.B. 1710, 1716-1717 (1964), enforced, 354 F.2d 170, 179 (2d Cir. 1965). Accordingly, the Board has determined that a discriminatee's discharge for failure to meet the job standards of an interim employer falls short of proof that he has incurred a willful loss of earnings so as to disqualify him for backpay following the discharge.

Petitioner concedes (Pet. 28) that Swaggerty was not discharged for an offense involving moral turpitude or lack of an honest effort to work, but simply asserts (Pet. 28-35) that the Board should apply a different rule and hold that a discriminatee is disqualified from receiving further backpay whenever he is discharged for failing to satisfy the job standards of an interim employer. As we have shown, the Board's approach is consistent with the principles governing the Board's broad discretion to remedy violations of the Act (see *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 539-540 (1943)), and has been uniformly approved. Accordingly, petitioner's contention does not warrant review by this Court.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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